

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2207, 8, 9, 10

ORIGINAL
WITH PROOF
OF SERVICE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM BRANDT, et al.,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX FOR APPELLANTS
MILEY, WENZLER, GOLDSTEIN, VAVARIGOS AND FLORES

IRVING COHEN
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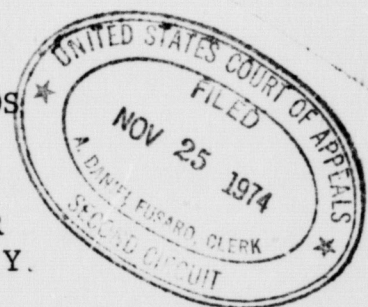
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PAGINATION AS IN ORIGINAL COPY

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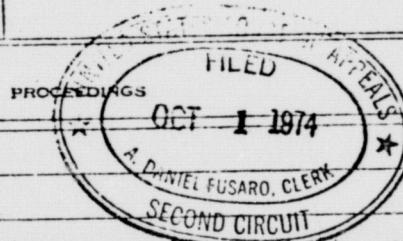
DOCKET ENTRIES

ATTORNEYS

| THE UNITED STATES | For U. S.: |
|----------------------------------|------------------------|
| "S. | Harry Batchelder, AUSA |
| WILLIAM BRANDT, II- 1-6 | 264-6395 |
| DAVID ROSS MILEY-1, 2, 4&6 | |
| JOSEPH RAYMOND WENZLER- 1, 5 & 9 | |
| DALVIN THOMAS GOLDSTEIN-1 & 8 | |
| DEAN PETER VAVARIGOS-1 & 3 | For Defendant: |
| ROBIN BACHIA-1, 6 & 7 | |
| JOHN CODISNSKY-1, 2 & 3 | |
| JAN LANG-1 & 5 | |
| DAVID FLORES-1 & 3 | |

| ABSTRACT OF COSTS | AMOUNT | CASH RECEIVED AND DISBURSED | | | |
|--|--------|-----------------------------|--------------------------|----------|-----------|
| | | DATE | NAME | RECEIVED | DISBURSED |
| Fine, | | 9/1 | Clerk | | |
| Clerk, | | 9/1 | Marshal | | |
| Marshal, 7, | | 9/1 | Attorney | | |
| Attorney, | | 9/1 | Commissioner's Court, 21 | | |
| Witnesses, 2, 6, 8, 12, 841(a)(1), (b) | | 9/1 | | | |
| Consp. to viol. Fed. Narcotic Laws (Ct. 1) | | | | | |
| Distr. & possess. w/intent to distr. | | | | | |
| Diethylamide, I & Phencyclidine (Cts 2-9) | | | | | |
| (Nine Counts) | | | | | |

| DATE | |
|---------|---|
| 2-21-74 | Filed indictment. |
| 2-25-74 | Deft. Brandt (atty. present) Pleads not guilty. Deft. continued remanded in lieu of bail previously fixed by Mag. (\$15,000.) Motions returnable in 10 days. |
| | Miley (atty. present) Pleads not guilty. Deft. continued remanded in lieu of bail fixed at \$10,000. P.R.B. secured by \$3,000. Motions returnable in 10 days. Case assigned to Judge Pollack for all purposes. |
| | Briaant, J. |



-cont'd on next page-

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DOCKET ENTRIES

Cr 100

Judge Pollack

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| DATE | PROCEEDINGS | CLERK'S FEES | |
|---------|---|--------------|-----------|
| | | PLAINTIFF | DEFENDANT |
| 3/4/74 | X Deft. Wenzler (atty present) Pleads not guilty 10 days for motions. Bail fixed at \$5,000. P.R.B. | | |
| | Deft. Goldstein (atty present) pleads not guilty 10 days for motions. Bail fixed at \$15,000. P.R.B. secured by \$1,500. cash. Bail limits ext. for 1 trip. to S. Carolina. | | |
| | Deft. Varvaricos (atty present) pleads not guilty 10 days for motions Bail fixed at \$5,000. P.R.B. | | |
| | Deft. Bachis-adj. to 3/11/74. | | |
| | Deft. Godiowsky- adj. to 3/11/74. | | |
| | Deft. Lang-adj. to 3/11/74. | | |
| | Deft. Flores (atty present) pleads not guilty. 10 days for motions Bail unsecured \$2,000. P.R.B. ordered photographed and fingerprint Pollack, J. | | |
| 3/4/74 | X DAVID FLORES-filed P.R.B. in the sum of \$2,000. | | |
| 3/7/74 | X WILLIAM BRANDT-filed notice of motion re: order permitting an in camera inspection of Grand Jury testimony, bill of particulars, etc ret: 3/13/74. | | |
| 3/7/74 | X David Ross Miley-filed remand dtd 2/25/74. | | |
| 3/11/74 | Deft. Robin Bachia-bench warrant ordered. | | |
| | Deft. John Godinsky-bench warrant ordered. | | |
| | Deft. Jan Land-bench warrant ordered. Pollack, J. | | |
| 3/12/74 | X Filed MEMO-END. on motion for in camera inspection, etc. dtd 3/7/74. Motions disposed of as indicated hereon on the hearing. Polla | | |

| | |
|---------|---|
| 3/11/74 | ROBIN BACHIA) -bench warrant issued. JAN LANG) JOHN GODINSKY) |
| 3/18/74 | X Filed ORDER that upon the notice of motion and motion dtd 3/7/74 for discovery by counsel for Wm. Brandt II and proceedings conducted on 3/11/74 each request contained in Schedule A and B is disposed of as indicated. Pollack, J. mn |
| 3/26/74 | X D. Flores- filed CJA 23 financial affdvt. |
| 3/28/74 | X D. Flores- filed CJA 20 appointment of counsel, Stephen Gillers 250 Bway, NYC 10017. Schrieber, Magistrate. mailed copies |
| 4/3/74 | X S. Meyers Atty for defts notice of motion re: suppression, etc. ret: 4/1 |
| 4/3/74 | X Deft Wm. Brandt (atty present) for bail application. Bail set at \$10,000 secured by \$3,000 cash to report to U.S. Marshals twice a week. Pol |
| 4/15/74 | Filed Court's Voir Dire. <i>Cont'd.</i> |
| 4/25/74 | X Hearing on motion by -atty Katz for William Brandt deft, to suppress is denied. Pollack, J. |
| 4/29/74 | X Deft Goldstein (atty present) hearing held on motion to suppress - motion denied. Pollack, J. |

D. C. 100 Criminal Court Judge: Pollack

RAYMOND F. BURCHARDT, Clerk

A. E. Thompson
Deputy Clerk

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DOCKET ENTRIES

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Judge Pollack

| DATE | PROCEEDINGS |
|---------|---|
| 4/29/74 | X Brandt, Miley, Wenzler, Goldstein, Vavarigos, Bachia, Godinsky and Flores - trial begun with a jury before Judge Pollack... Deft. Brandt- (atty present) Now pleads Guilty as to counts 1 and 3 only. Counts 2, 4, 5 and 6 are carried until the date of sentence. Pre-sentence report ordered For sentence 6/10/74 at 10 AM Rm 128. Deft. REMANDED Trial cont'd as to the remaining defts. Pollack, J. |
| 4/30/74 | X Trial cont'd. Deft Godinsky (atty present) now Pleads Guilty as to counts 1 and 2 only. Count 4 carried until the date of sentence. Pre-sentence report ordered. For sentence 6/10/74 at 10 AM rm 12 Bail cont'd-----Trial resumes.----- Deft. Bachia (atty Robert Koppelman present) Now Pleads guilty as to counts 1 and 6 only. Count 7 carried until the date of sentence. Pre-sentence report ordered. For sentence 6/10/74 at 10 AM rm 128. Bail cont'd. Trial cont'd. as to remaining defts. Pollack, J. |
| 5/1/74 | X Trial cont'd. |
| 5/2/74 | X Trial cont'd. All parties rest. All motions denied. |
| 5/3/74 | X Trial cont'd. |
| 5/6/74 | X Trial cont'd. The court charged the jury. The jury began deliberation. |
| 5/7/74 | X Trial cont'd. Jury resumed deliberating at 9:35 AM. Partial Verdict - Deft. David Ross Miley found not guilty on count 2. Deft. Joseph K. Wenger found GUILTY on count 5. Pollack, J. |
| 5/8/74 | X Trial cont'd and concluded. Jury disagreement as to the remaining defts and the remaining counts. All defense counsel move for a mistrial- GRANTED. Deft. Wenzler moves to set the verdict on count 5. Denied. Pre-sentence report ordered (to be held in abeyance for two (2) weeks. For sentence 7/1/74 at 10 AM Deft. Wenzler to retried on counts 1 and 9. Bail cont'd. Pollack, J. |
| 5/9/74 | X Deft. Brandt, filed acknowledgment of constitution rights (dtd 4/29/74) |
| 5/9/74 | X John Godinsky-filed acknowledgment of constitutional rights (dtd 4/30/74) |
| 5/9/74 | X Robin Bahie- filed acknowledgment of constitutional rights (dtd 4/30/74) |
| 6/4/74 | X J. Godinsky-filed CJA 20 approval for payment of fees of atty. Pollack |
| 6/4/74 | X Deft. Brandt- (atty Robert A. Katz present)- Appl. for reduction of bail to \$500.- is GRANTED with consent of the Govt. Deft is released on own recognizance with consent of the Govt and given until 6/7/74 at 3P.M. to post reduced bail of \$500. Sentence date is adj'd until 6/29/74 at 10AM room 2004. Pollack, J. |

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Judge Pollack

Pg 5

DATE

PROCEEDINGS

- 6/10/74 X John Godinsky- Filed JUDGMENT - It is adjudged that the deft. is sentenced as a YOUTH OFFENDER on each of counts 1 and 2 pursuant to Section 5010(a) of Title 18, U.S. Code. Imposition of sentence is suspended. Deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court. Special conditions of probation being that the deft. continue therapeutic treatment and find suitable employment and that within 48 hours he present himself to the Hudson County, New Jersey, Probation Department in connection with the pending alleged probation violation in that Court and further that he not leave this jurisdiction before the New York Probation Office ascertains the circumstances of his proposed residence in San Francisco, California. Count 4 is dismissed on motion of deft's counsel with consent of the Govt. Pollack, J. 6/11/74 Issued copies. ent. 6/11/74
- 6/13/74 Filed Govt.'s suppl. requests to charge.
- 6/11/74 X Hm. Brandt III- filed appearance bond in the sum of \$250.
- 6/17/74 X 2nd Trial- D. R. Miloy, J.R. Wenzler, M.T. Goldstein, D.P. Vavarigos and D. Flores- trial begun before Judge Pollack with a Jury.
- 6/18/74 X Trial cont'd.
- 6/19/74 X Trial cont'd.
- 6/20/74 X Trial cont'd.
- 6/21/74 X Trial cont'd and concluded. Jury verdict. All defts are found GUILTY as charged. Jury polled. Jury excused. All defts- pre-sentence report ordered. For sentence 9/9/74 at 10A.M. Rn 905. Bail cont'd. Pollack, J.
- 7/8/74 X Filed transcript of record of proceedings, dated 7/10-11/74
- 7/12/74 X Filed transcript of record of proceedings, dated 6/26-27/74
- 7/12/74 X Filed transcript of record of proceedings, dated 7/12/74
- 7/16/74 X ROBIN BACHIA- Filed JUDGMENT (atty present) Deft. is committed to the custody of the Atty. Gen'l. for imprisonment on each of counts 1+6 to run concurrently with each other for the maximum period authorized by law and for a study as described in Title 18, U.S. Code, Section 4208(c) and the Bureau of Prisons is requested to make neuropsychological, a psychiatric and a psychological study the results of such studies to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the deft. shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, U.S. Code, Section 4208(b). The Probation Department of this District is securing and will forward additional data to be received from available sources. Count 7 is dismissed on motion of the deft.'s counsel with consent of the Govt. Pollack, J. issued copies. Pollack, J. ent. 7/24/74

DOCKET ENTRIES

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PROCEEDINGS

- Aug. 15-74 X David Flores-Filed C.J.A. 20 Approval for payment of fees of counsel.
Pollack, J.
- Aug. 26-74 Dean Varvarigos-Filed CJA 20 approval for payment of fees of counsel.
- 8-27-74 X Filed motion for modification of terms of the sentence, dated 7/16/74
- 8/27/74 Filed letter from Sr. Garland to Judge Pollack dated 8/18/74
- 8/27/74 Filed memo on letter from Sr. Garland to Pollack, J. letter dated 8/18/74 is treated as a request for modification of terms of the sentence. Motion denied. Pollack, J. m.
- 9/9/74 X Filed deft. M. Goldstein's notice of appeal from judgment rendered 8/9/74. (mailed copies: to M. Goldstein & U.S. Atty.)
- 9/10/74 X Filed deft. D. Miley's notice of appeal from judgment dtd 9/9/74. Leave to file appeal in forma pauperis is granted. Pollack, J. mailed copies to: D. Miley & U. S. Atty.
- 9/9/74 X Filed deft. D. Varvarigos- CJA form 23 financial affdvt.
- 9/11/74 X D. Miley-filed CJA 23 financial affdvt.
- 9/9/74 X William Braddt III- Filed Judgment (atty. present) Deft. is committed to the custody of the Atty. Gen. 'l. for imprisonment for a period of NINE (9) MONTHS on count 3. Pursuant to the provision of Section 341, Title 21, U.S. Code deft. is placed on Special for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft placed on probation for TWO (2) YEARS to run concurrently with term of Special Parole and to follow the term of imprisonment on count 3. Counts 2, 4, 5 and 6 are dismissed on motion of def counsel with the consent of the Govt. Deft. is cont. 'd on pre bail until 9/19/74 at 11 A.M. at which time he is to surrender the U.S. Marshal in room 506 for service of sentence. Pollack, J. Issued copies ent. 9/13
- 9/9/74 X David Flores- Filed Judgment (atty. present) Deft. is committed to the custody of the Atty. Gen. 'l. for imprisonment on each of count 1 and 3 to run concurrently with each other pursuant to Section 4208(b), Title 18, U.S. Code, for study report and recommendations. The commitment deemed to be for the maximum sentence authorized by so wit FIVE (5) YEARS. The Bureau of Prisons is requested to neurological, psychiatric and psychological study. The result of such study to be furnished within 3 months, unless the court grant further time to exceed THREE (3) MONTHS whereupon the deft. is to return to this Court and the sentence of imprisonment herein imposed shall be subject to the modification in accordance with Section 4208(b), Title 18 U.S. Code. Deft is continued on pre bail pending appeal on condition that the Court be advised the Notice of Appeal has been Filed. Pollack, J. Issued copies. ent. 9/13

-cont'd on present bail-

DOCKET ENTRIES

page 4

U. S. DIST. CT. Docket Continuation

| DATE | PROCEEDINGS | Dist Judge |
|--------|---|---------------|
| 9/9/74 | <p>X Marvin Thomas Goldstein (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l. for imprisonment for a period of SIX (6) MONTHS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841, Title 21, U.S. Code, deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Deft. is cont'd on present bail pending appeal on condition that he file a notice of appeal this day. Pollack, J. Issued copies.</p> | ent. 9/13/74 |
| 9/9/74 | <p>X David Ross Miley (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l for a period of TWO (2) MONTHS on each of counts 4 and 6 to run concurrently with each other. Pursuant to the provisions of Section 841, Title 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for a TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on counts 4 and 6. Deft. is cont'd on present bail until 9/19/74 at 11 AM at which time he is to surrender to the U.S. Marshall in room 506 for service of sentence. Pollack, J. Issued copies</p> | ent. 9/13/74 |
| 9/9/74 | <p>X Dean Peter Vavarigos (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l. for imprisonment for a period of THREE (3) MONTHS on count 3. Pursuant to the provisions of Section 841, Title 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on count 3. Deft. is cont'd on present bail pending appeal on condition that he file a notice of appeal on or before 9/11/74. Pollack, J. Issued copies.</p> | ent. 9/13/74 |
| 9/9/74 | <p>X JOSEPH RAYMOND WENZLER- (atty. present) Filed JUDGMENT - deft. is committed to the custody of the Atty. Gen.'l for imprisonment for a period of FOUR (4) MONTHS on each of counts 5 and 9 to run concurrently with each other. Pursuant to the provisions of Section 841, T. 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on counts 5 and 9. on Special condition that the deft. undertake counsel as directed by the Probation office until such time as it is considered no longer necessary. Deft. is cont'd on present bail pending appeal herein. Pollack, J. Issued copies</p> | ent. 9/13/74 |

-cont.'d. on next page-

DOCKET ENTRIES

Judge Pollack

| DATE | PROCEEDINGS |
|---------|---|
| 9/9/74 | X David Flores- filed notice of appeal from judgment entered 9/9/74. Leave to file the within notice of appeal in forma pauperis is hereby granted. Pollack, J. mailed notices to: U.S. Atty. S. Ciliers |
| 9/10/74 | X Dean Varvarigos- filed notice of appeal from judgment entered 9/9/74 mailed copies to: U.S. Atty. D. Varvarigos. |
| 9/11/74 | X J. Wehrer- filed notice of appeal from judgment entered 9/9/74. mailed copies to: U.S. Atty. S. Meyers. |
| 9/15/74 | X L. Goldstein- filed notice of appeal (copy) |
| 9/16/74 | X filed memorandum- Pursuant to Rule 24 of the Rules of Appellate Procedure, the forma pauperis order heretofore entered permits the processing of the appeal in forma pauperis unless the Dist. Court shall certify that the appeal is not taken in good faith, etc. In forma pauperis on appeal is granted. Pollack |
| 9/19/74 | X William Bradt- filed notice of appeal from judgment dtd 9/9/74. mailed copies. |
| 4-8-74 | X NOTICE OF APPEARANCE, VARVARIGOS, DEAN, BY L. JACOBSEN. |
| 5-6-74 | X APPEARANCE BOND: MILEY. |
| 8-28-74 | X TRANSFER OF JURISDICTION OF GORDINSKY FROM NO-DIST. CAL. |

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - :

WILLIAM BRANDT II, :
DAVID ROSS MILEY, :
JOSEPH RAYMOND WENZLER, :
MARVIN THOMAS GOLDSTEIN, :
DEAN PETER VAVARIGOS, :
ROBIN BACHIA, :
JOHN GODINSKY, :
JAN LANG, and :
DAVID FLORES, :

Defendants. :

- - - - - x

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of November, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY, JOSEPH RAYMOND WENZLER, MARVIN THOMAS GOLDSTEIN, DEAN PETER VAVARIGOS, ROBIN BACHIA, JOHN GODINSKY, JAN LANG and DAVID FLORES, the defendants and others to the Grand Jury unknown, unlawfully intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812,

INDICTMENT

841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowing would distribute and possess with intent to distribute Schedule I and II controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841 (b)(1)(B) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

On or about November 27, 1973 defendants WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY sold a quantity of lysergic acid diethylamide for \$650.00.

On or about December 13, 1973 defendant WILLIAM BRANDT II went from the Village Plaza Hotel, 79 Washington Street, New York, New York to the vicinity of Avenue A and East 11th Street.

On or about December 13, 1973 defendants WILLIAM BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS had a meeting in apartment 4A, 501 East 11th Street, New York, New York.

On or about December 13, 1973 defendants WILLIAM

INDICTMENT

BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS sold a quantity of phencyclidine for \$1,800.00.

On or about January 3, 1974 defendant JOHN GODINSKY went from the area of the Village Plaza Hotel, 79 Washington Street, New York, New York and proceeded to the area of West Fourth Street and Bowery Street.

On or about January 3, 1974 defendants WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY sold a quantity of lysergic acid diethylamide for \$1,925.00.

On or about January 10, 1974 the defendant DEAN PETER VAVARIGOS gave away a quantity of phencyclidine as a sample.

On or about January 15, 1974 the defendants WILLIAM BRANDT II, JAN LANG and JOSEPH RAYMOND WENZLER sold a quantity of lysergic acid diethylamide for \$1,200.00.

On or about February 12, 1974 the defendants WILLIAM BRANDT II, DAVID ROSS MILEY and ROBIN BACHIA sold approximately 1800 dosage units of lysergic acid diethylamide for \$660.00.

On or about February 12, 1974 ROBIN BACHIA transported to the area of 3rd Avenue and St. Marks Place approximately 10,000 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Section 846.)

INDICTMENT

COUNT TWO

The Grand Jury further charges:

On or about the 27th day of November, 1973 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 164.8 milligrams of lyergic acid diethylamide in the form of 1000 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 13th day of December, 1973 in the Southern District of New York, WILLIAM BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, approximately 27.11 grams of phencyclidine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

INDICTMENT

COUNT FOUR

The Grand Jury further charges:

On or about the 3rd day of January, 1974 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 665087.5 micrograms of lysergic acid diethylamide in the form of 3850 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

On or about the 15th day of January, 1974 in the Southern District of New York, WILLIAM BRANDT II, JAN LANG and JOSEPH RAYMOND WENZLER, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 320.26 milligrams of lysergic acid diethylamide in the form of 4070 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

INDICTMENT

COUNT SIX

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MEILLY and ROBIN BACHIA, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 1800 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT SEVEN

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, ROBIN BACHIA, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 10,000 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

COUNT EIGHT

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, MARVIN THOMAS GOLDSTEIN, the

INDICTMENT

defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 4000 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

COUNT NINE

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, JOSEPH RAYMOND WENZLER, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 295 tablets containing lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

Foreman

PAUL J. CURRAN
United States Attorney

1 gth

702

2 UNITES STATES OF AMERICA

3 v.

4 DAVID ROSS MILEY, et al.

74 Cr. 188

5 CHARGE OF THE COURT

6 (Pollack, J.)

7 THE CLERK: The Court is about to charge the
8 jury. Any spectators wishing to leave the courtroom will
9 do so now or remain seated until the completion of the
10 Court's charge.

11 THE COURT: Ladies and gentlemen of the jury,
12 we have now reached the concluding phase of the trial.
13 I want to express to you the thanks of the Court for your
14 faithful attendance, patience and close attention to the
15 case.

16 You have now heard and received all of the
17 evidence on which the case is to be decided and through the
18 arguments of the respective counsel you have learned the
19 conclusion which each party believes should be drawn from
20 the evidence presented to you.

21 In this charge I shall outline the principles
22 of law which will be your guide in your deliberations.
23 It is your duty to accept these instructions on the law
24 as they are given to you by me whether you agree with them
25 or not. On the other hand, it is your exclusive function
to determine the facts on the basis of your consideration

1 gth
2 of the evidence.

3 As exclusive judges of the facts, your decision
4 thereon is final and conclusive. Applying my instructions
5 on the law to the facts as you find them, you will decide
6 whether the defendant on trial before you is guilty or not
7 guilty of the charges made against him, or any of them.

8 The indictment in this case names nine persons
9 as defendants. When the jury was selected you were intro-
10 duced to counsel and the defendants. However, only five are
11 on trial before you. They are the only persons as to whom
12 you will render a verdict. Although as I will explain to
13 you shortly in considering whether any of them are guilty,
14 that is, any of the five are guilty or not guilty, you
15 may have to determine the nature of the participation,
16 if any, of the other named defendants not now before you.

17 During the course of the trial there was evidence
18 indicating that others than the defendants now before you
19 were allegedly involved in one way or another with the
20 activities which are the subject of this indictment. I
21 charge you that the fact that other people allegedly involved
22 are not now on trial before you is to play no role in your
23 deliberations as to the five before you, except to the
24 extent that I have mentioned. No inference, favorable
25 or unfavorable to either side or to any individual defendant,

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2 may be drawn from the fact that other people are not now
3 on trial before you. It must not affect your deliberations
4 in any way with respect to whether a defendant who is on
5 trial is guilty or not guilty of the offenses charged
6 against him.

7 Six counts or charges of the indictment will be
8 submitted for your verdict. Each count charges the person
9 or persons named therein with a separate offense or crime.
10 Each must be considered separately and each defendant
11 must be separately considered. Later on I will read
12 each count being considered from the indictment.

13 In substance, the first count charges all
14 five defendants who are before you with wilfully and
15 knowingly conspiring among themselves and with the other
16 named defendants to violate the federal drug laws. The
17 third, fourth, sixth, eighth and ninth counts, those counts
18 are the ones which you will consider, and they charge
19 the persons named therein with actually distributing or
20 possessing with intent to distribute or aiding and abetting
21 those things -- and I am going to say these chemical terms
22 once and thereafter refer to them only by initials --
23 lysergic acid diethylamide, that is LSD, or phencyclidine,
24 PCP, as the case may be.

25 The substantive counts or the counts beginning

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with number 3 are referred to as substantive counts to distinguish them from the conspiracy count. The conspiracy charge is a charge of scheming, plotting or agreeing to commit offenses. The substantive counts are based on actual commissions, carrying out of such alleged offenses.

I shall first mention several general principles of law which apply to this as well as to every jury trial of a criminal case..

A criminal case is initiated when a grand jury issues an accusation against the defendants named on the basis of probable cause to believe that a crime was committed. It is not the function of a grand jury to determine whether the defendant named by it is guilty or not guilty. That is the function of a trial jury, like yourselves. Consequently, the indictment so filed is not to be taken by the trial jury as any evidence whatsoever on the charges made therein. It is not evidence that the crime was committed, it is a charge.

When the five defendants came before the court in response to the indictment, each pleaded not guilty to the charges against him. Under our system of law, a defendant is presumed to be innocent and he carries that presumption throughout the trial and until the jury is persuaded, if it is, that the government has proved the

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2 defendant's guilt beyond a reasonable doubt, a term which
3 I will explain to you in a few moments.

4 Under the law a defendant does not have to
5 prove his or her innocence or submit any evidence at all.
6 I will repeat that. Under the law a defendant does not
7 have to prove his or her innocence or submit any evidence
8 at all, he is presumed to be innocent. The presumption
9 of innocence is a conclusion drawn by the law in favor
10 of the citizen by virtue of which he must be acquitted
11 of a criminal charge unless he is proven to be guilty
12 beyond a reasonable doubt.

13 In other words, this presumption is an instrument
14 of proof created by the law in favor of one accused whereby
15 his innocence is established until sufficient evidence
16 is introduced to overcome the proof the law has created.

17 The evidence that has been admitted is the only
18 source from which the facts are to be drawn and from which
19 factual inferences are to be drawn. You will recall on
20 occasion questions have been asked, some carrying im-
21 plications, but objections were sustained blocking answers
22 to the questions. At times answers were given to questions
23 and the answers were ordered stricken from the record.
24 Such unanswered questions and innuendos therefrom, if
25 any, and stricken answers must be disregarded. They are not

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2 evidence in the case.

3 The form of an unanswered question and any at-
4 mosphere or innuendo suggested by it are to be ignored.
5 They are not evidence in the case. Courtroom exclamations,
6 if any, off the witness stand are not evidence in the
7 case nor are apologies evidence in the case. As I have
8 repeatedly said to you, what has been said in your hearing
9 by any person other than a witness or said or exclaimed
10 by the lawyers for either side or even by the court here-
11 tofore or in this charge in relation to the facts is not
12 evidence. Your memory of the evidence is what must
13 govern you in the determination of the case.

14 Counsel have given you their viewpoints. I
15 may refer to some of the evidence. However, it is your
16 recollection of the evidence and your judgment of the facts
17 that controls. It is for you to determine the weight
18 that will be given to the evidence, the credibility that
19 you will extend to the witnesses who testify and the
20 reasonable inferences that are to be drawn from the
21 evidence that has been received.

22 There are two kinds of evidence recognized
23 and admitted in courts of justice, on either one of which
24 you may find an accused guilty of a crime. One is called
25 direct evidence and the other is called circumstantial

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2 evidence.

3 Direct evidence is evidence which frequently
4 is adduced by testimony of an eyewitness or a participant
5 or in a tape recording and tends to show a fact in issue
6 without need for any further amplification. Of course,
7 there is always a question of whether it is to be believed.

8 Circumstantial evidence, on the other hand,
9 is indirect. It is proof of a chain of circumstances
10 pointing to the existence or non-existence of certain facts.
11 There must, however, be positive proof of some fact which
12 affords a basis, a starting point from which a reasonable
13 inference may be drawn of the fact to be inferred. Cir-
14 cumstantial evidence is that evidence which tends to prove
15 a fact in issue by proof of other facts which have a
16 legitimate tendency to lead the mind to infer that the facts
17 sought to be established are true.

18 Let me give an example, to illustrate just what
19 I have said.

20 Suppose when you came into the building this
21 morning, as it was, the sun was shining brightly outside
22 and then you came into this courtroom and suppose you found
23 the blinds were drawn so you couldn't see what the weather
24 was like during the rest of the day. As you were sitting
25 here during the course of the day in walks a person with

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2 an umbrella dripping and a raincoat dripping. You haven't
3 seen any rain outside, but from the circumstances of
4 the person walking in with a dripping umbrella and a
5 dripping raincoat it is reasonable for you to infer the
6 further fact that it is raining outside, although you
7 can't see it.

8 That is what circumstantial evidence is. It
9 consists of facts proved from which the jury may infer
10 by a process of reasoning other facts in issue. It is not
11 necessary that the participation of the defendant be shown
12 by direct evidence. The connection may be inferred from
13 such facts and circumstances and evidence as legitimately
14 tend to sustain the inference.

15 In this case each side has produced both direct
16 and indirect or circumstantial evidence. The government
17 contends that its evidence establishes each defendant's
18 guilt on each charge. Each defendant contends that no
19 evidence has overcome the presumption of innocence and
20 that at least there is a reasonable doubt of his guilt.

21 The law permits you to consider what may be
22 termed as negative evidence. This refers to the absence
23 of some fact or circumstance which could reasonably be
24 expected to have occurred. If some act, statement or event
25 could reasonably be expected to follow some prior event,

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2 act, statement or occurrence and there was no evidence
3 that it did, then you may consider its absence in determin-
4 ing the strength of the proof submitted to you.

5 You will apply to all the evidence the same
6 standard of proof. It is the government which must satisfy
7 you of the guilt of the defendant beyond a reasonable doubt
8 on every essential element of the offense being considered
9 or else you must acquit the defendant whom you are con-
10 sidering of the offense charged.

11 However, the government is not required to prove
12 guilt beyond every possible doubt nor to an absolute
13 certainty. Such a measure of proof is usually impossible
14 and is not required.

15 By reasonable doubt we don't mean just any
16 old doubt. By reasonable doubt we mean a doubt which is
17 sufficient to cause a prudent person to hesitate to act
18 in a matter of importance to himself or herself.

19 If the evidence which you believe is such that
20 would induce a prudent person to act without hesitation
21 in a matter of importance to himself or herself, then
22 you may say you have been convinced beyond a reasonable
23 doubt. If, on the other hand, your mind is wavering or
24 uncertain to the point where you have a doubt that would
25 cause a prudent person to hesitate in a matter of importance

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2 to him or her, then you have not been convinced beyond
3 a reasonable doubt.

4 Speculative notions or possibilities resting
5 upon mere conjecture not arising or deducible from the
6 proof should not be confounded with reasonable doubt.

7 A doubt suggested by the ingenuity of counsel or by your
8 own ingenuity not legitimately warranted by the evidence,
9 or the want of it, or one born of a merciful inclination
10 to permit the defendant to escape the penalty of the law
11 or one prompted by sympathy for him is not what is meant
12 by a reasonable doubt.

13 Reasonable doubt, as that term is employed
14 in the administration of criminal law, is an honest mis-
15 giving generated by the proof or want of it. It is such
16 a state of the proof as fails to convince your judgment
17 and conscience and satisfy your reason of the guilt of
18 the accused of the particular charge considered.

19 In the whole evidence, when carefully examined,
20 weighed, compared and considered produces in your minds
21 a conviction or belief of the defendant's guilt, such an
22 abiding conviction as you would be willing to act upon in
23 the most weighty and important affairs of your own life,
24 you may be said to be free from any reasonable doubt and
25 should find the verdict in accordance with that conviction

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2 or belief.

3 In the determination of whether a defendant
4 is guilty or not guilty you must bear in mind that guilt
5 is personal. Whether a particular defendant is guilty
6 or not must be determined by the jury beyond a reasonable
7 doubt solely by the evidence introduced as to the particular
8 defendant or the lack thereof and from the reasonable
9 inferences that may flow from the direct and circumstantial
10 evidence as to the particular defendant, and that deter-
11 mination must be made on the evidence relating to the
12 particular defendant and nothing else.

13 You must make your own evaluation of the evidence,
14 including the testimony given by each of the witnesses,
15 and determine the degree of weight you choose to give to
16 such evidence. It is for you to determine from the
17 evidence and demeanor on the stand of a witness particularly
18 on material matter related to the charges whether or not
19 he has given truthful reliable testimony or unintentionally
20 or other-wise embroidered the truth, falsified, exaggerated
21 or suppressed material facts and, thus, given an unreliable
22 story.

23 In evaluating the testimony, whoever the
24 witness may have been, you may consider the interest or
25 lack of interest of the witness in the outcome of the case,

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2 the bias or prejudice of the witness, if you find that
3 he had one, the appearance, the manner in which the witness
4 gave his testimony on the stand, the opportunity that the
5 witness had to observe and note the facts concerning
6 which he testified, the probability or improbability of
7 the witness' testimony when viewed in the light of all
8 the evidence in the case. Those are all items to be
9 taken into consideration in determining the weight, if any,
10 that you will assign to that witness' testimony.

11 The testimony of a witness may fail to conform
12 to the facts as they occurred because the witness is in-
13 tentiously telling a falsehood or because the witness didn't
14 accurately see or hear that about which the witness testi-
15 fied or because his recollection of the event is faulty
16 or even because the witness has not expressed himself
17 or herself clearly in giving the testimony.

18 You are entitled to consider the possibility
19 that when a witness is called upon to testify well after
20 the event and at great length inconsistencies may be the
21 result of an innocent mistake or lapse of memory rather
22 than of a deliberate intention to falsify or change the
23 facts. In short, it is not unusual for a witness in
24 a lengthy proceeding to utter inconsistencies at some stage
25 along the line.

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If your consideration of the evidence makes it appear that there were differing versions of the facts resulting in a discrepancy in the evidence, you may, if you wish, consider whether or not the apparent discrepancy involved is an understandable error and can be reconciled in fitting the two stories together in a rational relationship. In other words, in passing on all issues of credibility, you determine the degree and the extent to which you accept or reject the testimony.

You may, if you wish, accept so much of the testimony of a witness as you may deem the truth and disregard what you feel is faulty or mistaken or unclear. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve testimony in whole or only in part even though it is not otherwise impeached or contradicted.

If you find that any witness has wilfully testified falsely as to any fact material to the case that you are considering, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite like to testify falsely about everything. However, here again, you are not required to consider such a witness is totally unworthy of belief.

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A witness who has given false testimony may also have given credible testimony. You may, if you wish, accept so much of his testimony as you believe true and reliable and disregard what you feel is false or unworthy of acceptance.

The defendants did not testify on their own behalf and our law says that a defendant may or may not take the stand. The fact that a defendant did not testify cannot be considered by you as any evidence against him or form a basis for any presumption or inference unfavorable to him. You must not permit such fact to weigh in the slightest degree against such a defendant, nor should it enter into your discussions or deliberations.

In order to return a verdict on any count as to any defendant, each juror must agree on the particular finding as to the particular defendant, that is, the finding must be unanimous. The form of your report will be that you find the defendant guilty or not guilty of the particular charge that you are considering.

I have given you a suitable form which names each defendant who is now before you and identifies the counts in the indictment against that defendant that you are to consider with appropriate columns for recording your vote.

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Each defendant is entitled to have determined whether he is guilty or not guilty as to each of the crimes charged, determined from his own conduct and from the evidence which applies to him as if he were being tried alone.

Whether any one defendant is guilty or not guilty of the crimes charged should not influence your verdict respecting any other defendant. The jury may find any one or more of the defendants guilty or not guilty on one or more counts.

You will have an opportunity to call for and read the indictment yourselves, but I will give it to you at this time so that you can follow the course of this charge.

Two classes of charges are before you, as I have said, distribution or possession with intent to distribute controlled drug substances, and such counts are known as substantive counts, and separately a conspiracy or scheme to distribute or to possess with intent to distribute controlled drug substances.

I will read the indictment to you in the sequence of the substantive charges and then the conspiracy charge.

Count 3. The grand jury further charges on or about the 13th day of December, 1973, in the Southern District of New York, William Brandt, the second, David

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2 Flores and Dean Peter Vavarigos, the defendants, unlawfully,
3 intentionally and knowingly did distribute and possess
4 with intent to distribute a schedule 3 controlled substance,
5 to wit, approximately 27.11 grams of PCP.

6 I think you will recall that that was a horse
7 drug.

8 Count 4. The grand jury further charges on
9 or about the 3rd day of January, 1974, in the Southern
10 District of New York, William Brandt the second, David
11 Ross Miley and John Godinsky, the defendants, unlawfully,
12 intentionally and knowingly did distribute and possess
13 with intent to distribute a schedule 1 controlled substance,
14 to wit, approximately 665087.5 micrograms of lysergic
15 acid diethylamide, LSD, in the form of 3,850 dosage units.

16 Count 6. On or about the 12th day of February,
17 1974, in the Southern District of New York, William Brandt,
18 the second, David Ross Miley and Robin Bachia, the defendants,
19 unlawfully, intentionally and knowingly did distribute
20 and possessed with intent to distribute a schedule 1 con-
21 trolled substance, to wit, approximately 1,800 dosage units
22 of LSD.

23 Count 8. On or about the 12th day of February,
24 1974, in the Southern District of New York, Marvin Thomas
25 Goldstein, the defendant, unlawfully, intentionally and

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2 knowingly did possess with intent to distribute a schedule
3 1 controlled substance, to wit, approximately 4,000 dosage
4 units of LSD.

5 Count 9. The grand jury further charges on or
6 about the 12th day of February, 1974, in the Southern
7 District of New York, Joseph Raymond Wenzler, the defendant,
8 unlawfully, intentionally and knowingly did possess
9 with intent to distribute a schedule 1 controlled substance,
10 to wit, approximately 295 tablets containing LSD.

11 I will now turn to count 1, the conspiracy count.

12 From on or about the 1st day of November, 1973,
13 and continuously thereafter up to and including the date
14 of the filing of this indictment, in the Southern District
15 of New York, William Brandt, the second, David Ross Miley,
16 Joseph Raymond Wenzler, Marvin Thomas Goldstein, Dean
17 Peter Vavarigos, Robin Bachia, John Godinsky, Jan Lang
18 and David Flores, the defendants, and others to the grand
19 jury unknown, unlawfully, intentionally and knowingly
20 combined, conspired, confederated and agreed together
21 and with each other to violate Sections 812, 841(a)(1) and
22 841(b)(1) of Title 21, United States Code.

23 It was part of said conspiracy that the said
24 defendants unlawfully, intentionally and knowingly would
25 distribute and possess with intent to distribute schedule 1

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2 and 2 controlled substances, the exact amount thereof
3 being to the grand jury unknown, in violation of Sections
4 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States
5 Code.

6 Overt acts.

7 In pursuance of the said conspiracy and to
8 effect the objects thereof, the following overt acts
9 were committed in the Southern District of New York.

10 On or about November 27, 1973, defendants
11 William Brandt, the second, and John Godinsky sold a
12 quantity of LSD for \$650.

13 On or about December 13, 1973, defendant William
14 Brandt, second, went from the Village Plaza Hotel, 79
15 Washington Street, New York, to the vicinity of Avenue A
16 and East 11th Street.

17 On or about December 13, 1973, defendants William
18 Brandt, second, David Flores and Dean Peter Vavarigos
19 had a meeting in apartment 4A, 501 East 11th Street,
20 New York, New York.

21 On or about December 13, 1973, defendants
22 William Brandt, second, David Flores and Dean Peter
23 Vavarigos sold a quantity of PCP for \$1,800.

24 On or about January 3, 1974, defendant John
25 Godinsky went from the area of the Village Plaza Hotel,

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2 79 Washington Street, New York, New York, and proceeded
3 to the area of West 4th Street and Bowery Street.

4 On or about January 3, 1974, defendants William
5 Brandt, II, David Ross Miley and John Godinsky sold a
6 quantity of LSD for \$1,825.

7 On or about January 10, 1974, the defendant
8 Dean Peter Vavarigos gave away a quantity of PCP as
9 a sample.

10 On or about January 15, 1974, the defendants
11 William Brandt, II, Jan Lang and Joseph Raymond Wenzler
12 sold a quantity of LSD for \$1,200.

13 On or about February 12, 1974, the defendants
14 William Brandt, II, David Ross Miley and Robin Bachia
15 sold approximately 1,800 dosage units of LSD for \$660.

16 On or about February 12, 1974, Robin Bachia
17 transported to the area of Third Avenue and St. Marks
18 Place approximately 10,000 dosage units of LSD.

19 The essence of the crime of conspiracy is the
20 scheme or plot understanding or agreement to violate other
21 laws. It makes no difference whether the scheme was
22 successful or whether it failed of its purpose, it is
23 still punishable as a crime. Consequently, on a controlled
24 substances conspiracy charge there is no need to prove
25 an actual violation of the federal drug laws, it is enough

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2 that there was a criminal plan.

3 The conspiracy statute, Section 371 of Title
4 18 of the United States Code, provides in pertinent part
5 as follows:

6 "If two or more persons conspire to commit any
7 offense against the United States and one or more of such
8 persons does any act to effect the object of the conspiracy,
9 each shall be guilty of a crime."

10 The comprehensive Drug Abuse Prevention Act of
11 1970 sets forth the law pertaining to controlled substances.
12 This law was passed by Congress because of a concern with
13 the illegal distribution of and possession with intent
14 to distribute the drugs named therein which have a sub-
15 stantial and detrimental effect on the health and welfare
16 of our people. The part of this Act which is applicable
17 to the charges here is called the Controlled Substances
18 Act, which became effective on May 1, 1971.

19 The term "controlled substances" is used in the
20 Act to refer to any drug included in one of the five
21 schedules contained in the Controlled Substances Act.
22 LSD is included in schedule 1. THC -- and I haven't given
23 you the chemical name of that previously, which is tetra-
24 hydracannabinol -- THC is included in schedule 2. PCP
25 is included in schedule 3.

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Among other things, the Act makes it unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute any controlled substances such as LSD or THC or PCP. In addition, any person who conspires to commit such an offense commits a crime.

I remind you that the conspiracy count as distinguished from the substantive counts does not apply to PCP, which, although it too is a controlled substance, is a schedule 3 drug, and the grand jury's charge here of the scheme or conspiracy recited only a relation to schedule 1 and schedule 2 drugs. The only drugs that have been mentioned in the evidence that are in schedule 1 or schedule 2 are LSD, THC and cocaine.

In order to prove the crime alleged in the first count, that is, the criminal conspiracy, the government must establish several elements beyond a reasonable doubt.

First, the proof must show that the conspiracy during part or all of the period from on or about November 1, 1973, until the indictment in this case was filed on February 21, 1974. The government is not required to prove that the conspiracy began on a specific day or ended on a specific day. Proof that a conspiracy existed for a substantial portion of that period, even though it might be a relatively small part of that period, would be

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2 be sufficient.

3 Second, the government has to prove that it
4 was part of the conspiracy to unlawfully violate the
5 controlled substances statute to which I have referred.

6 Third, the government must prove that the defendant
7 being considered knowingly and wilfully became a participant
8 in the conspiracy.

9 Fourth, the government must prove that least
10 one alleged co-conspirator knowingly committed at least
11 one of the alleged overt acts in furtherance of the con-
12 spiracy during the period of its existence.

13 I have read to you the overt acts recited in
14 the indictment. Under our law it is not sufficient
15 to constitute a crime to agree mentally to an unlawful
16 scheme if no act occurs to carry out some part in
17 the conspiracy. Such an act is called an overt act because
18 it is an actual and open and not a concealed act. The
19 overt acts have been cited to you.

20 If the government has failed to establish
21 beyond a reasonable doubt each of the essential elements
22 mentioned as to any defendant, you must acquit that
23 defendant on the conspiracy charge. If, on the other
24 hand, it has established each of the elements as to the
25 defendant you are considering, you are to find that defendant

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2 you are considering, you are to find that defendant guilty.

3 Now, what is a conspiracy? It is simply a com-
4 bination or an agreement or a scheme of two or more
5 persons or concerted acts by two or more persons to
6 accomplish a criminal or unlawful purpose. There have
7 to be at least two people involved. You can't conspire
8 with yourself. It is, in essence, a partnership in crime.
9 The gift of the offense is the combination or agreement
10 to violate the law.

11 In this case the offense charged was violation
12 of the federal drug laws, as I mentioned, in furtherance
13 of which an overt act was committed according to the
14 indictment.

15 It is not necessary that a conspiracy be
16 established by direct evidence in order to convict. It
17 being rarely proved in that fashion. You may consider,
18 if you wish, whether people sit down and sign agreements
19 to engage in an unlawful scheme or activity or have
20 them notatized or made known to the public. You may
21 consider, if you wish, whether that type of conduct
22 would be extraordinary.

23 Your common sense will tell you that when men,
24 in fact, enter into a criminal conspiracy, much is left
25 to the unexpressed understanding. It is sufficient if two

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2 or more persons in any manner, impliedly or tacitly,
3 come to a common understanding to violate the law. It is
4 not necessary that the persons charged sit down and enter
5 into a formal agreement or state all the details of their
6 agreement or scheme how it is to be effectuated.

7 A conspiracy may, on occasion, involve a matter
8 of inference to be drawn from the conduct of the persons
9 charged. Actions may often speak louder than words and
10 a defendant's participation in a conspiracy may be inferred
11 from such facts and circumstances in evidence as appear
12 to you logically to support or sustain such an inference.
13 It is sufficient if it be shown beyond a reasonable doubt
14 that the defendant and ^{an} alleged co-conspirator came to
15 a mutual understanding to accomplish an unlawful act.

16 To determine whether a conspiracy existed you
17 **piece** together the independent evidence relating to each
18 alleged conspirator and determine looking at the whole
19 picture whether the acts, conduct and statements of the
20 alleged conspirators and the reasonable inferences to be
21 drawn from their acts, conduct and statements establish
22 to your satisfaction beyond a reasonable doubt that there
23 was a single conspiracy.

24 If, for example, there was a concerted action
25 among several persons with each of them doing something

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2 related to the act of the other all of which contributed
3 in the same or similar manner toward the accomplishment
4 of some unlawful objective, such evidence would support
5 the inference that those persons had conspired together to
6 accomplish that unlawful purpose.

7 I call to your attention that an unlawful scheme
8 or agreement may exist even though the individual alleged
9 conspirators may have done some acts in furtherance of
10 a common unlawful purpose apart from and even unknown
11 to the others.

12 Although I have instructed you that it is not
13 necessary to prove that the parties ever came together
14 and entered into an informal or a formal agreement or
15 arrangement between themselves, I do not mean to imply
16 or infer that a conspiracy as alleged in the indictment
17 in fact existed. As I previously told you, that is not
18 my function. That is the determination of fact which you
19 must make.

20 A conspiracy, once formed, is presumed to continue
21 until either its objective was accomplished or until there
22 is some affirmative act of termination by its members.
23 A conspiracy is not ended as long as the evidence shows
24 an intention to continue it. Such intention may be inferred
25 from activities of conspirators in furtherance of the

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2 unlawful purpose of the alleged conspiracy.

3 Once a person is found to be a member of the
4 conspiracy, he is presumed to continue his membership
5 therein until its objective was accomplished or there was
6 some affirmative act of termination by its members or
7 until his withdrawal.

8 As I have said, an unlawful conspiracy may exist
9 even though its purposes are not accomplished, but evidence
10 that its purposes were accomplished, such as proof of
11 actual sales or distribution, may be considered by you
12 if you find that there is such evidence as proof bearing
13 on the existence of the conspiracy.

14 If you find that the alleged conspiracy as
15 charged in the indictment did exist, you must focus your
16 attention next and separately on each defendant to
17 determine whether the defendant knowingly and wilfully
18 became a member of the conspiracy. Of course, if you find
19 that no conspiracy existed, that would end the consideration
20 of count 1 and it would be unnecessary for you to consider
21 any other factors.

22 To determine whether a defendant was a member
23 of the alleged conspiracy, you ask yourselves whether
24 that particular defendant acted wilfully and with knowledge
25 that his acts were an integral part of the unlawful

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2 enterprise and to help carry it forward as an associate
3 or worker in it. You must find that the defendant knew
4 what the unlawful purpose was and a stake or a personal
5 interest in it as distinguished from acting exclusively
6 on his own.

7 It is not necessary that a defendant be fully
8 informed as to the details or the full scope of the alleged
9 conspiracy in order to justify an inference of knowledge
10 on his part nor need he even know all the alleged co-
11 conspirators.

12 The guilt of an alleged conspirator is not
13 measured by the extent or duration of his alleged partici-
14 pation. Even if he participated to a degree more limited
15 than that of his co-conspirators or in a subordinate or
16 a minor way relatively, he is equally culpable, so long
17 as he was, in fact, a conspirator.

18 The scope of each defendant's agreement must
19 be determined individually from what was proved as to
20 that defendant. In order for a defendant to be held
21 for joining others in an alleged conspiracy he must in
22 some sense promote the venture himself and make it his own.
23 To do this you must determine what each conspirator is
24 promoting and making his own.

25 A single act may be the basis for drawing an

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2 actor within the ambit of an alleged conspiracy, but since
3 conviction of conspiracy requires an intent to participate
4 in the unlawful enterprise, the single act must be such
5 that one may reasonably infer from it such an intent.

6 Stated another way, a sale or purchase scarcely
7 constitutes a sufficient basis for inferring an agreement
8 with the opposite parties for whatever period they continue
9 to deal in this kind of contraband, unless some such
10 understanding is evidenced by other conduct which ac-
11 companies or supplements the transaction.

12 Proof of participation in a single isolated
13 controlled substances transaction standing alone is in-
14 sufficient to warrant conviction of conspiracy when there
15 is no independent evidence tending to prove that the
16 defendant had some knowledge of the broader conspiracy
17 and an intention to participate therein, that is, when the
18 single transaction is not in itself one from which such
19 knowledge and intent may be inferred.

20 I want to call to your attention that merely
21 association with one or more of the alleged conspirators
22 does not make one a member of the alleged conspiracy,
23 nor is knowledge without participation sufficient. A mere
24 willing participation and acts with alleged co-conspirators
25 knowing in a general way that their intent was to break

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2 the law is, if standing alone, insufficient to establish
3 an individual's own participation in a conspiracy. There
4 must be participation in the alleged conspiracy with an
5 intent to further the common purpose or design. In short,
6 a person becomes a member of an alleged conspiracy by
7 associating himself even though informally with a common
8 plan or scheme by participating, knowing the central aim
9 or purpose and intending to aid in bringing about the
10 success of the plan or scheme.

11 All conspirators or alleged conspirators need
12 not have originally or simultaneously conceived the
13 alleged conspiracy or participated in it at its inception.
14 In order to be guilty one who comes in later with the
15 knowledge of the means and purpose, although not neces-
16 sarily of the details, and who intentionally cooperates
17 in a common effort to gain the unlawful result may become
18 a member of the alleged conspiracy equally with the alleged
19 conspirators and he is legally responsible for the purposes
20 of the conspiracy count for all of the acts done by any
21 of the other members before or afterwards in furtherance
22 of the common objective just like any partner who is a
23 member of a partnership agreement.

24 The acts or statements of one alleged co-
25 conspirator may be considered by you as evidence against

1 gth
2 other alleged co-conspirators, but only if you find
3 that the statements and acts were spoken and done during
4 the continuance of the alleged conspiracy and in aid of
5 and in furtherance of the purpose of the alleged con-
6 spiracy. You must be satisfied beyond a reasonable
7 doubt that a conspiracy existed and that the defendant
8 joined the conspiracy before you can regard the act
9 of any defendant as being in furtherance of a conspiracy
10 alleged in this indictment.

11 The status of the managing partner, supervisor
12 or worker, his participation in key conversations or
13 transactions, his participation in the alleged plan,
14 scheme or agreement must be considered. You must find
15 beyond a reasonable doubt that he did, in fact, join
16 the alleged conspiracy with knowledge of its unlawful
17 purpose and intended to aid and assist in accomplishing
18 that purpose. This intent may be inferred from his acts
19 and declarations and no direct proof is necessary.

20 In sum, the participation of a defendant must
21 be established by his own actions, by his own statements
22 and declarations, by his own knowledge or lack of knowledge,
23 by his own connection with the acts and statements of
24 other alleged co-conspirators.

25 The defendants deny the existence of any

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2 conspiracy and each denies any membership in a conspiracy.
3 Further, they say if the jury were to find proof of con-
4 spiracy, it was a multiple conspiracy.

5 It is contended here that the government has
6 failed to prove the existence of only one alleged con-
7 spiracy but has proved several separate and independent
8 alleged conspiracies, that is, multiple conspiracies,
9 involving various of the defendants.

10 Proof of several separate and independent
11 conspiracies is not proof of a single overall conspiracy,
12 which is charged in this indictment. And if you find that
13 the government has failed to prove the existence of only
14 one conspiracy, you must find the defendants not guilty
15 on the conspiracy count.

16 I wish to make it clear that the defendants
17 deny any conspiracy, single or multiple, existed.

18 In determining whether there was a single
19 overall conspiracy, you may consider what the evidence
20 shows as to the time, parties or objects and changes of
21 personnel and activity. You may find a single conspiracy
22 even though there were changes in personnel and activities,
23 providing you find that some of the co-conspirators
24 continued throughout the life of the alleged conspiracy
25 and that the purposes of the alleged conspiracy continued

1 gth

2 to be those charged in the indictment. The issue turns
3 on whether the proof warrants an inference that the de-
4 fendant was aware of and, thus, knowingly furthered an
5 overall going venture or partnership.

6 You are instructed that in order to prove one
7 single conspiracy the government has to prove beyond
8 a reasonable doubt that each of the persons whom you find
9 to be members of the conspiracy intended to make himself
10 part of the scheme charged in the indictment.

11 The mere fact that the parties are not always
12 identical does not mean that there are separate conspiracies.
13 In other words, if at all times the alleged conspiracy
14 had the same overall primary purpose and the same nucleus
15 of participants, the alleged conspiracy would be the same
16 basic scheme even though in the course of its operation
17 additional alleged conspirators joined in and performed
18 functions to carry out the scheme while others were not
19 active or had terminated their relationship.

20 On the other hand, if you find that one overall
21 conspiracy terminated and another one was formed, you may
22 not find a single conspiracy even though the purposes of
23 both conspiracies were the same and that some of the
24 defendants were members of both. In essence, therefore,
25 the question is, what is the nature of the scheme or agreement

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2 That is for you to determine after examining all the
3 evidence.

4 Thus, to summarize my third question whether
5 a defendant was a member of the alleged conspiracy, where
6 you find that a violation of the statute was sought to
7 be accomplished and two or more persons actuated by a
8 common purpose of accomplishing that end knowingly worked
9 together in any way in furtherance of the unlawful scheme,
10 every one of such persons becomes a member of the alleged
11 conspiracy even though his part in it may be separated
12 in time from the activities of his co-conspirators.

13 If you find that the alleged conspirators
14 existed and that the particular defendant as to whom
15 the charges are being considered by you was a member,
16 you reach the fourth and final step, and that is that
17 you must determine whether one or more members of the
18 alleged conspiracy,, not necessarily the particular
19 defendant you are considering, has committed one or more
20 of the overt acts alleged in the indictment to have
21 been committed in furtherance of some object or purpose
22 of the alleged conspiracy and that it was committed in
23 furtherance of that act, object or purpose.

24 The object of a conspiracy is complete when
25 the unlawful agreement is made and any single related

1 gth

2 overt act in furtherance of it is done by one of the
3 alleged co-conspirators. Thereafter, an act done by
4 any one of the alleged conspirators in furtherance of the
5 alleged conspiracy becomes an act by all members of the
6 illegal partnership.

7 Of course, an overt act by anyone who is not
8 a member of the alleged conspiracy would not apply.

9 What is an overt act?

10 An overt act is an open act or step or action
11 or conduct taken to achieve, accomplish or further the
12 objectives of the alleged conspiracy. The purpose of re-
13 quiring proof of an overt or open act is to assure that
14 where parties have conspired and agreed to do some unlawful
15 thing but they have changed their minds and abandoned
16 the project or done nothing at all to carry it out they
17 will not be charged with a crime.

18 The prosecution is not required to set forth
19 in the indictment each and every act on which it relies
20 to establish the alleged conspiracy or on which it relies
21 to establish each defendant's participation in such con-
22 spiracy, nor is the prosecution required to prove each overt
23 act which may have occurred during and in furtherance
24 of such conspiracy. It is required only to prove that
25 at least one such act did take place.

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2 The overt act proved need not be a criminal act
3 in and of itself, nor need it be the crime which is the
4 object of the alleged conspirators. It may consist of
5 the holding of a meeting or the like, providing the act
6 was to further the objective of the alleged conspiracy.

7 That completes the discussion of the conspiracy
8 count. Since you have listened to me for quite a long time,
9 we will take a short pause where you can relax in place
10 before I complete the balance of the charge.

11 (Pause)

12 All right, ladies and gentlemen, I will continue.

13 I will now turn to the essential elements of
14 the substantive counts which are numbered 3, 4, six, 8 and
15 9.

16 Before you can find the named defendants guilty
17 of the crimes charged in those counts in this indictment,
18 you must be convinced and find beyond a reasonable doubt
19 as to the count and the defendant you are considering
20 that the government has proved the following essential
21 elements.

22 First, that on or about the date set forth
23 in each count, the defendant or defendants named in that
24 count distributed or actually or constructively possessed
25 with intent to distribute the controlled substance drug

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2 named in that count. It is sufficient if you find either
3 distribution or possession with intent to distribute.

4 Second, that he did so unlawfully, wilfully
5 and knowingly.

6 Third, that the substance alleged in the
7 respective count was, in fact, a controlled substance drug.

8 The word distribute means the actual or con-
9 structive or attempted transfer of a drug.

10 The word possess has its common everyday meaning,
11 that is, to have something within your control. And to have
12 something within your control does not necessarily mean
13 to have it in your hands or pocket. Control may be demon-
14 strated by the existence of a working relationship between
15 the person having such control and the person with actual
16 physical custody.

17 The word intent refers to a person's state of
18 mind so the term possessed with intent to distribute
19 can be fairly stated to mean to control an item with
20 a state of mind or purpose to transfer that item or to
21 cause it to be transferred.

22 The proof of actual possession is not necessary
23 to sustain a conviction for violation of the statutes
24 involved, constructive possession is sufficient. Such
25 possession need not be exclusive but may be shared with

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2 others. Moreover, it may be proved by circumstantial
3 as well as by direct evidence.

4 Mere presence in the area where a controlled
5 substance drug is discovered or the mere association with
6 a person who controls the drug or the property where it
7 is located is insufficient to support a finding of possession.
8 If you find beyond a reasonable doubt that the transfer
9 alleged to have been made was made, I charge you that each
10 such transfer satisfies this requirement of the statute.

11 As to the second element, the terms unlawfully,
12 wilfully and knowingly, they mean that you must be satisfied
13 beyond a reasonable doubt that the defendant knew what
14 he was doing and that he did it deliberately and voluntarily
15 as opposed to mistakenly or as a result of some coercion.
16 Of course, it is not necessary that the defendant knew
17 that he was violating any particular law, rather, it is
18 sufficient if you are convinced beyond a reasonable doubt
19 that he was aware of the general unlawful nature of his acts.

20 Knowledge and intent exist in the mind. Since
21 it is not possible to look into a man's mind to see what went
22 on in it, the only way you have of arriving at a decision
23 on these questions is for you to take into consideration
24 all the facts and circumstances shown by the evidence,
25 including the exhibits, and to determine from all such

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2 facts and circumstances whether the requisite knowledge
3 and intent were present at the time in question. Direct
4 proof is unnecessary.

5 Knowledge and intent may be inferred from
6 all the surrounding circumstances. As far as intent is
7 concerned, you are instructed that a person is presumed
8 to have intended the natural and probable or ordinary
9 consequences of his acts.

10 As to the third element, the indictment charges
11 that the controlled substance in these substantive counts
12 is either LSD or PCP. I instruct you, again, as a matter
13 of law that each of those is a controlled substance.
14 You, however, must still find beyond a reasonable doubt
15 that the substances charged in the substantive counts
16 to have been distributed were LSD or PCP.

17 There is a stipulation before you to the effect
18 that if the chemist were called to the witness stand he
19 would testify that the substances referred to in the
20 evidence on the substantive counts were, in fact, LSD or
21 PCP.

22 I have now reviewed the elements of the substantive
23 counts that the government must prove beyond a reasonable
24 doubt before you can find that the defendant is guilty
25 on those counts. There is, furthermore, another method by

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2 which you should evaluate the evidence and which would
3 sustain a finding of guilt of the defendant charged on
4 the substantive counts even though the government's proof
5 on the substantive counts was not sufficient as to him
6 to establish all the required elements.

7 You will recall that in the instructions
8 I have given you as to the crime of conspiracy charged
9 in the first count that if you find pursuant to those
10 instructions that a particular defendant was a conspirator,
11 was a member of the single conspiracy and, hence, guilty
12 under the first count, you may find him guilty as well
13 under a substantive count in the indictment, providing
14 you find the crime charged in the substantive count
15 was committed and that it was committed during and in
16 furtherance of the conspiracy charged in the first count.

17 If he is a member of a conspiracy, just like
18 a partner, he is criminally responsible for the substantive
19 crimes and may be found guilty of those. The reason
20 for this is that his co-conspirator committing the sub-
21 stantive crimes is the agent of the other members of
22 the alleged conspiracy.

23 However, if a particular defendant was not
24 a member of the alleged conspiracy or if the crime charged
25 in the substantive count was not committed during the

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2 pendency of the alleged conspiracy or if the crime
3 charged in the substantive count was not done in furtherance
4 of the conspiracy, then you may not find the defendant
5 guilty of the substantive count, unless as to him the
6 government has proved beyond a reasonable doubt, along
7 with all the other elements I have given you, that the
8 defendant did the acts charged in that particular substantive
9 count or aided and abetted in the commission of the sub-
10 stantive crime.

11 In this connection, Section 2 of Title 18 of
12 the United States Code, provides that a person who aids,
13 abets, **counsels**, commands, induces or procures the
14 commission of an offense against the United States is
15 as equally punishable as the person who commits the offense
16 directly.

17 In order to aid and abet another to commit a
18 crime, it is necessary that a defendant in some sort
19 associate himself with a venture that he participate
20 in it as in something that he wishes to bring about
21 and that he seek by his actions to make it successful.

22 Mere knowledge that a crime is being committed,
23 even when coupled with presence at the scene, is not
24 enough to constitute aiding and abetting, rather, it is
25 required that an individual promote the venture himself,

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make it his own, have a stake in the outcome.

Much of the evidence adduced by the government was adduced in support of the conspiracy count of the indictment. Much of the same evidence has been produced in support of the substantive counts of the indictment. If the evidence relates to and is connected up with the conspiracy count and the substantive counts, there is nothing inconsistent with using parts of the same evidence to prove that a particular defendant committed a substantive crime and also to prove that he was a member of a conspiracy.

You may also be asking yourselves whether the same **test** as to the use of the evidence applies to the substantive counts as to the conspiracy counts. Particularly, you may be wondering whether if you find that all of the elements of the alleged conspiracy were present as to two or more defendants, acts or declarations of one alleged conspirator in furtherance of the alleged conspiracy may be considered in determining the guilt **or innocence** of the member defendants on the substantive counts. The short answer to this question is yes.

Evidence of acts or declarations of one conspirator binding on a confederate on an agency theory are not to be confined to the conspiracy count. Such evidence is also competent to prove guilt of the substantive crime

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2 if you find that there was a conspiracy in existence
3 and that the defendant was a member of it.

4 As I indicated previously, to convict on a
5 substantive count you must find beyond a reasonable doubt
6 that the defendant acted unlawfully, wilfully and knowingly
7 as I have already defined those terms for you.

8 The government contends that the evidence shows
9 that on several occasions when Agents Palombo and Nieves
10 discussed narcotics with Dean Vavarigos, Robin Bachia,
11 William Brandt and David Miley that those conversations
12 were taped with various recording devices.

13 Just in case you might have some doubts on this
14 subject, I am instructing you that the use of these devices
15 in the manner described in this case is entirely within
16 the law and violates no one's rights. This is so essentially
17 because Agents Palombo and Nieves, who were participants
18 in the conversations, consented to have them recorded.
19 Accordingly, the use of these devices was a proper in-
20 vestigative technique.

21 The government further contends that its evidence
22 shows that on February 12, 1974, the defendants Joseph
23 Wenzler and Marvin Goldstein were arrested in their
24 apartments, that Marvin Goldstein executed a written
25 consent to search form and that Joseph Wenzler gave oral

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2 consent to search.

3 The searches conducted in the apartments of
4 Joseph Wenzler and Marvin Goldstein were, according to the
5 government, conducted in their presence and the government
6 contends were with their consent. If you determine that
7 consent was given as testified, then the same were lawful
8 and the evidence before you has been lawfully introduced.

9 Members of the jury, under your oath as jurors
10 you cannot allow any consideration of the punishment which
11 might be inflicted upon a defendant if convicted to influence
12 your verdict in any way or in any sense enter into your
13 deliberations. The duty of imposing sentence following
14 conviction rests exclusively upon this court. That
15 solely the judge's responsibility. Your function is to weigh
16 the evidence in the case and to determine whether the
17 defendants are guilty or not guilty solely on the basis
18 of such evidence and the law.

19 You are not here to improvise the rules of law
20 or remake them by indirection or subtlety. You are bound
21 to administer the law as it stands. There should be no debate
22 in a jury room or in a juror's mind as to the wisdom of
23 the law. It would be a violation of your sworn duty to dis-
24 regard the law or fail to apply it to the facts in evidence.
25 This is neither a popularity contest or a sympathy chamber.

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2 It is a hall in which each of us, sworn to uphold the
3 law, must do our duty regardless of how personally dis-
4 tasteful that might be.

5 You are to decide the case upon the evidence
6 alone. You must not be influenced by any assumptions,
7 conjectures or inferences not warranted by the facts,
8 unless and until proven to your satisfaction.

9 In deliberating on this case I want you to
10 listen to each other carefully in the jury room. If you
11 think you are wrong and somebody else is right, do not
12 be embarrassed about changing your mind. But remember
13 each of you is to decide the case for yourself. You must
14 bring in a verdict for or against the defendant in
15 question on each count under which the defendant is
16 charged whether not guilty or guilty and any verdict,
17 as I have said before, to be acceptable must be unanimous
18 as to a count on which you are reporting.

19 Use your common sense in evaluating the evidence
20 and circumstances and probabilities. Suspicion, conjecture
21 should not be substituted for the evidence. Do not allow
22 yourselves to be swayed or carried away or inflamed
23 by appeals to passion, sympathy or prejudice. Maintain
24 a clear view of the case and do not be sidetracked by
25 anything or anybody from a fair dispassionate consideration

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2 of the evidence in arriving at your resolution of the facts
3 in the case that you are now deciding.

4 The oath that you took at the outset when you
5 were sworn as jurors really sums up what you are supposed
6 to do in this case, and that is without fear or favor
7 to any party, you will well and truly decide the issues
8 according to the evidence and the law as stated to you by
9 the court.

10 If you desire any of the exhibits, those will be
11 sent to you in the jury room upon request. As I have said,
12 you may have a copy of the indictment if you desire to
13 have it.

14 If you want any of the testimony read, that can
15 be done, also. It is not easy to find the testimony in
16 the notes of the reporter, so, therefore, try to be as
17 specific as you can in regard to any requests that you do
18 make.

19 Please do not communicate with anyone concerning
20 your deliberations about this case except in writing signed
21 by your foreman, unless you choose another person than
22 the gentleman who sits in the first seat. He will be
23 provided with adequate pencils and papers by the marshals.

24 Now I would like to take a few minutes to
25 talk to the lawyers. They may wish to call to my attention

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2 any matter on which I might have or which I may have over-
3 looked, so if you will just relax in the jury box I
4 will talk to them.

5 I want to call to your attention that there
6 is a stenographic error in the form of the verdict
7 that I furnished to you, and that is the last of the counts
8 on the page is actually count IX, nine, not ten, so
9 that the foreman will correct his copy accordingly since
10 that will be the one which ultimately will be the one
11 to be signed and returned. The other forms of verdict
12 are merely for your convenient use and they will be
13 handed in to the clerk when you have completed your
14 deliberations.

15 Gentlemen, come up.

16 (At the side bar.)

17 THE COURT: Mr. Batchelder, for the government,
18 are there any exceptions?

19 MR. BATCHELDER: Yes, there are, your Honor.

20 With respect to your charge that the single act
21 of a mere narcotics transaction cannot be considered or
22 constitute knowledge of a conspiracy, I cite to the court
23 the case of U.S. v. Ramirez in which Mr. Gillers' single
24 act conspiracy theory as to the single act has been
25 rejected, 482 Fed. 2nd, 2nd Circuit, 807, 1973.

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On almost the identical same facts in which two conspirators were together, the drugs were delivered by a third conspirator, the traditional approach was taken that the delivery and the mere presence on this single act made it such that it could not form the basis of the conspiracy, I quote from the court's opinion:

"While Gutaris' participation may be limited to a single act as she contends, that being the delivery of the narcotics on that one occasion, that the sale, if you will, that act was the consummation of the crimes charged, in this instance the delivery of the THC, and the jury could have reasonably inferred that Gutaris knowingly and intentionally participated in the conspiracy," and that applies here as it did in the Ramirez case because there were two other co-conspirators present.

Therefore, the court's charge on the issue of the single act, according to the government's position, is error, especially in light of the close factual record where she only made one single act, that being the delivery of the narcotics.

In this case there was a single sale. Flores must have known that since it was done in his apartment, Vavarigos was present, he received money. It cannot be held to be a single act under any way, shape, form or manner

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2 and he had to have knowledge of it because Brandt sent
3 the agents over there along with him.

4 That is the only objection the government has,
5 your Honor.

6 If you wish to read the decision, I have it
7 here.

8 THE COURT: You apparently misheard the charge.
9 I didn't give the charge as you have indicated that I
10 should not have given. The charge as given is entirely,
11 in my judgment, consistent with the language you have
12 read.

13 MR. BATCHELDER: The government has its objection.

14 THE COURT: Are there any exceptions or requests
15 on the part of the defendant Miley?

16 MR. FRACTENBERG: If your Honor please, all I
17 wish to say is that since your Honor indicated that the
18 jury may have a copy of the indictment, that with respect
19 to overt act dealing with November 27, 1973 --

20 THE COURT: That has already been taken care of
21 by a copy that I showed to other counsel.

22 MR. FRACTENBERG: Okay. I didn't see it, Judge.
23 Thank you.

24 THE COURT: You have no exceptions or requests,
25 Mr. Meyers?

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2 MR. MEYERS: Yes, I do.

3 Your Honor, I think the same mistake must have
4 been made on this occasion as I think you ultimately
5 corrected on the first trial in dealing with -- I think you
6 made some statement to the effect that the government
7 contended there was a single conspiracy and the defendants
8 contended there were multiple conspiracies.

9 The defendants contend there were no conspiracies
10 at all.

11 THE COURT: You misheard the charge. I expressly
12 charged to the contrary at the suggestion of Mr. Gillers.

13 MR. FRACTENBERG: That's right.

14 MR. MEYERS: In relation to count number 10--

15 THE COURT: Is that your recollection, Mr. Gillers?

16 MR. FRACTENBERG: Yes.

17 MR. GILLERS: Your Honor, I have no problem
18 with this charge at all. I think it is eminently fair.

19 MR. MEYERS: In relation to count number 9
20 you referred solely to leave the question to the jury,
21 solely on the question of consent to search, but you did
22 not touch the question as to whether there was consent
23 to enter the apartment.

24 THE COURT: I received no request on that subject
25 from either the government or the defendants and I think

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2 that that is a detail of evidence that I need not go into.

3 MR. MEYERS: I think the evidence will show that
4 that was a question --

5 THE COURT: I decline to make any additions
6 to the charge on that score, as there was no such contention.

7 MR. MEYERS: Exception, your Honor.

8 I specifically request your Honor to charge
9 as follows:

10 That one of the government witnesses, Starbuck,
11 participated in the crimes charged in the indictment and,
12 therefore, was an accomplice. Starbuck's testimony must,
13 therefore, be received with caution and weighed with
14 care, citing Silkworth v. The United States, 10 Federal
15 2nd, 711 in this circuit, and the United States v. Marx,
16 368 Federal 2nd, 5566 in the Second Circuit.

17 MR. BATCHELDER: May the government be heard on
18 that, your Honor?

19 In both Marx and Silkworth, the person was
20 an accomplice.

21 MR. MEYERS: May I offer the request.

22 MR. BATCHELDER: In this instance, Starbuck
23 was an informer and, therefore, in Silkworth and Marx
24 it may be quite proper to charge that he was part of it,
25 but in this instance there is no evidence whatsoever that

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2 Starbuck, acting in the traditional role of an informant,
3 such as in Soles and Cirillo, Sperling, in any way was
4 an accomplice to these defendants and, therefore, Mr. Meyers'
5 charge is totally out of line.

6 THE COURT: I think that that's correct, but I will
7 make a statement without ruling that Starbuck was an
8 accomplice. I don't think the evidence warrants the statement
9 that he was an accomplice at all.

10 MR. MEYERS: Your Honor, certainly all the
11 evidence indicates that he participated in the transactions.

12 THE COURT: That does not make him an accomplice.

13 MR. MEYERS: Then he is a principal.

14 THE COURT: All right, Mr. Meyers.

15 Are there any exceptions or requests by Mr. Cohen?

16 MR. COHEN: No, none, your Honor.

17 THE COURT: Are there any exceptions or requests
18 by Mr. Jacobson?

19 MR. JACOBSON: No, your Honor.

20 THE COURT: Are there any exceptions or requests
21 by Mr. Gillers?

22 MR. GILLERS: None, your Honor.

23 THE COURT: All right, gentlemen.

24 (In open court.)

25 THE COURT: One small addition and that is this:

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2 I instructed the jury on the consideration
3 of the credibility of witnesses and I would like to add that
4 should the jury find from the evidence that anyone who
5 testified was an accomplice, the jury will consider the
6 testimony of such a person with care and examine it with
7 utmost scrutiny.

8 That completes the charge.

9 We are now at the point, where having reached the end
10 of the trial successfully with all present and accounted for
11 that we may now excuse the alternate jurors from further
12 participation in the case.

13 So Mr. Fitzgerald, Miss Gordon, Mr. Brendon
14 and Mr. Fowler are excused with the thanks of the court.

15 Will you please hand back to the clerk the forms
16 that you have and you may depart.

17 Thank you very much.

18 (Alternate jurors excused.)

19 THE COURT: As to the jury itself, let me give you
20 the option.. After we swear the marshals, you may wish to
21 commence your deliberations immediately and go out to lunch
22 at one or you may wish to go out to lunch now and commence
23 your deliberations on your return.

24 Do you have a preference?

25 (Two marshals were duly sworn.)

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Joint Appendix for Appellate *Miley Wenzler*
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Sign _____
For: *Hon Paul Curran* Esq(s).

Att'ys for *Appellee*